

The Honorable Ronald B. Leighton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

SOLOWHEEL, INC.,

Plaintiff,

Case No. 3:16-cv-05688-RBL

V.

NINEBOT INC (USA), D/B/A NINEBOT U.S., INC.; NINEBOT (TIANJIN) TECHNOLOGY CO., LTD; NINEBOT INC (China),

Defendants.

MOTION TO COMPEL DISCOVERY

**NOTE ON MOTION CALENDAR:
March 8, 2019**

I. INTRODUCTION & SUMMARY OF ARGUMENT

Pursuant to Fed. R. Civ. P 37 and LCR7(d)(3), Plaintiff Solowheel, Inc, (“Solowheel”) respectfully submits this Motion to Compel Defendant Ninebot (Tianjin) Technology Co., LTD (“Ninebot”) to remedy Ninebot’s ongoing refusal to comply with its discovery obligations under the Federal Rules of Civil Procedure.

Solowheel served discovery on Ninebot more than 14 months ago.¹ Ninebot responded to Solowheel's requests by promising to produce documents and promising to give further detailed responses – over one year ago. Despite having over a year to produce, and despite Solowheel's repeated requests, Ninebot refuses to produce any documents that are not otherwise publicly available.

II. FACTUAL BACKGROUND

A. Ninebot Provided Boilerplate Objections and Insufficient Responses.

This dispute arose as a result of Ninebot's past and present infringement of Solowheel's patents related to electric unicycles.

On November 20, 2017, Solowheel served Ninebot with 75 Requests for Production (Hodges Decl. Exhibit A) and 13 Interrogatories (Hodges Decl. Exhibit B). After Solowheel granted Ninebot a 30 day extension to respond, Ninebot responded on January 8, 2018, with its initial responses to the Requests for Production (Hodges Decl. Exhibit C) the Interrogatories (Hodges Decl. Exhibit D).

Ninebot's discovery responses amount to boilerplate objections, and various promises to produce information less than what was requested. Hodges Decl. at ¶ 6. Ninebot did include production of 450 pages of documents. These documents are the file history of the '250 Patent, various patents and patent publications pulled from publically available USPTO sources (public

¹ The discovery requests at issue are attached to the Declaration of Benjamin J. Hodges in Support of Plaintiff Solowheel's Motion To Compel ("Hodges Decl.").

PAIR) screen shots from Ninebot's website, and screen shots from eBay displaying the search results for "electric unicycle." Hodges Decl. ¶ 7. Ninebot did not produce *any* internal correspondence, technical specifications for any product, documents related to Mr. Shane Chen, Inventist, or Solowheel, or any sales/financial data for the Accused Products. Hodges Decl. at ¶¶ 6-7. In fact, the January 2018 production does not include a single non-public document. Hodges Decl. at ¶ 7. Further, Ninebot's responses to Solowheel's Interrogatories repeatedly state that Ninebot will produce responsive documents to satisfy Solowheel's questions, but Ninebot has failed to provide these allegedly sufficient documents.

B. Ninebot Has Failed To Supplement Its Insufficient Responses And Document Production Despite Repeated Requests.

Solowheel amended its complaint on March 7, 2018 to include additional claims and additional Ninebot products. Ninebot has not supplemented any of its discovery responses or production in light of the new counts in the Amended Complaint. Hodges Decl. at ¶ 8.

For months, the Parties diligently pursued settlement discussions, but ultimately it became clear that settlement would not be possible, particularly without sales information to discuss a possible license. Thus, on September 21, 2018, counsel for Solowheel and Ninebot met and conferred, and counsel for Solowheel informed Ninebot that a letter highlighting the insufficiency of Ninebot's discovery would be forthcoming. Hodges Decl. at ¶ 9.

On September 28, 2018, counsel for Solowheel sent that letter to counsel for Ninebot detailing numerous deficiencies in Ninebot's production. Hodges Decl. at ¶ 10. The letter suggested the parties meet and confer, and requested a response by October 8, 2018. Hodges Decl. at ¶ 10; Hodges Decl. Exhibit E.

On October 8, 2018, Ninebot responded that it needed more time to respond to Solowheel's letter, despite having 10 days, and that it would be producing "some" sales documents. Hodges Decl. at ¶ 11. Hodges Decl. Exhibit F.

1 On October 9, 2018, Ninebot stated that it could not produce these documents, since no
 2 protective order was in place. After various attempts at agreeing to Protective Order failed, and
 3 Ninebot continued to fail to produce or supplement, Solowheel informed Ninebot that given
 4 Ninebot's continued dodging of discovery, Solowheel would be filing this Motion to Compel as
 5 well as a Motion for Protective Order. Hodges Decl. at ¶ 13. This exchange is attached as
 6 Exhibit G to the Hodges Decl.²

7 On October 31, 2018, over a month after Ninebot received Solowheel's letter, and only
 8 after repeated requests from Solowheel, Ninebot responded with its own letter. Hodges Decl. at ¶
 9 14. No production accompanied the letter. In its response, Ninebot made excuses regarding its
 10 delays, blamed Solowheel for failing to threaten Ninebot sooner, ignored case law cited by
 11 Solowheel without citing any in response, and disputed its obligation to supplement its
 12 discovery. This letter is attached as Exhibit H.

13 **III.LOCAL RULE 37 CERTIFICATION**

14 Counsel for Solowheel and Ninebot conferred in an effort to resolve the issues addressed
 15 in this motion but were unable to resolve the dispute contained in this motion.

16 **IV. ARGUMENT**

17 “Parties may obtain discovery regarding any non-privileged matter that is relevant to any
 18 party’s claim or defense.” Fed. R. Civ. P. 26(b)(1) (effective December 1, 2015). If requested
 19 discovery is not provided, the requesting party may move for an order compelling such discovery.
 20 Fed. R. Civ. P. 37(a)(1), LCR 37. Under the liberal discovery principles of the Federal Rules, the
 21 party resisting discovery bears a heavy burden of showing why discovery should be denied. *See*
 22 *Blankenship v. Hearst*, 519 F.2d 418, 429 (9th Cir. 1975).

25

² As Ninebot continues to refuse to respond on the Protective Order, Solowheel is
 26 contemporaneously filing a Motion for Protective Order.

1 Despite Solowheel's efforts, Ninebot will not participate in discovery without judicial
2 intervention. In the more than fourteen months since Solowheel initially served Ninebot with
3 discovery requests, and the year since Ninebot responded, Ninebot has failed to produce a single
4 non-public document and failed to substantively respond to 6 of the 12 Interrogatories. Ninebot
5 is currently hiding behind the protective order issue in an attempt to further delay, however, even
6 were a protective order in place, and were Ninebot to produce the minuscule subset of documents
7 it promised in its October 31, 2018 letter, that would still be insufficient. The protective order
8 issue does not address the many improper objections that Ninebot is using to artificially narrow
9 the production (which still hasn't occurred), it does not adequately address the completely
10 improper Interrogatory responses, and it does not address Ninebot's refusal to supplement.
11

12 **A. Solowheel's RFPs and ROGs are Appropriately Specific.**

13 Solowheel served Ninebot with discovery requests based on the specifics of this case.
14 Solowheel's RFPs seek: relevant internal correspondence, Accused Product histories and
15 development background, technical specifications for any Accused Product, knowledge of
16 Solowheel's patents and products, efforts in design around, any documents related to Mr. Chen,
17 Inventist, or Solowheel, sales/financial data of the Accused Products, and other information
18 about Ninebot's products relevant to claim construction, infringement, and damages. These types
19 of documents are necessary in any litigation, and especially necessary in patent litigation, where
20 infringement, or damages all may turn on non-public information.
21

22 Solowheel further narrowed its requests through the use of defined terms. For example,
23 Solowheel limited the majority of its requests to "Accused Products." Hodges Decl. Ex. A at 5.
24 This definition was tailored to the particular products identified by Solowheel and the specific
25

1 patents at issue to include only “single wheel personal transport product or system, or component
 2 thereof, developed, marketed, or sold by Ninebot, including at least the Ninebot One.” *Id.*

3 **B. Despite Solowheel’s Appropriate RFPs and ROGs, Ninebot Failed to Participate in
 4 Discovery.**

5 Ninebot made its position clear that it believes that “[Ninebot’s] responses were complete
 6 and correct when drafted.” Hodges Decl. Ex. H at 2. As discussed below, Ninebot’s responses
 7 were incomplete when drafted, and have only become more incomplete after the Amended
 8 Complaint and the additional patents added therein.

9 **1. Ninebot has Failed to Actually Produce Any Documents – Even Where it
 10 Promised to Produce.**

11 Ninebot promised production for at least Requests for Production Nos. 4-18, 20-21, 24-
 12 27, 29-32, 34-37, 39-40, 42, 44, 46, 48-52, 54-59, 62, 63, and 67-69. Ninebot had considerable
 13 objections even to these Requests, but under its “General Considerations 4,” Ninebot specifically
 14 stated “Unless specifically recited otherwise, no responsive materials are being withheld on the
 15 basis of the objections stated.” Despite its promises and considerations, Ninebot has not
 16 produced even a single responsive document for any these requests.

17 Further, Ninebot often promised to produce documents different than requested, or
 18 promised only a small subset of the requested documents. For instance, Solowheel’s RFP No. 10
 19 asks for: “All documents and things concerning **any single wheel personal transporter or**
 20 **electric unicycles, licensed, manufactured, tested, used, sold and/or offered for sale by**
 21 **Ninebot.**” Hodges Decl. Ex. A at 9. In its response, Ninebot promised to produce only those
 22 documents “relating to the accused Ninebot One products depicted in the [original] Complaint.”
 23 Hodges Decl. Ex. C at 10-11. This promised production is much narrower than the request. It is
 24
 25
 26

1 improper to produce less than what Solowheel requested and Ninebot should produce fully, not
2 an arbitrarily limited subset of the documents that has no proper basis in objections. Fed. R. Civ.
3 P. Rule 34 (The response must provide access to the information requested).

4 Ninebot also promised to produce documents sufficient to answer Interrogatory Nos. 2, 3,
5 4, 7, 8, and 9. For example, Ninebot's answer to Interrogatory No. 2 that "Ninebot will provide a
6 sales Document that demonstrates the sales in the US of the accused Ninebot One products . . .,"
7 is insufficient. Hodges Decl. Ex. D at 9. A Fed. R. Civ. P. 33(d) answer cannot be prospective
8 and must include identification of a specific a document, or documents, with the requested
9 information. Ninebot failed to include or particularly identify any documents with its responses.

10 In place of a narrative response, Fed. R. Civ. P. 33(d) allows the responding party to
11 produce, and identify by specific Bates number, the applicable responsive documents to these
12 Interrogatories. *In re Fresh & Process Potatoes Antitrust Litig.*, No. 4:10-md-02186-BLW-
13 CWD, 2014 U.S. Dist. LEXIS 12595, at *20-21 (D. Idaho Jan. 31, 2014) (Defendants are
14 required by Fed. R. Civ. P. 33(d) to identify, by Bates number and by search terms used to locate
15 them, the responsive documents within the searchable database responsive to Interrogatory 1,
16 and to ensure that Plaintiffs have sufficient explanation regarding the documents so that
17 Plaintiffs may review and extract the necessary information); *Behrouz Shokri v. The Boeing Co.*,
18 No. C16-1132 RSM, 2017 U.S. Dist. LEXIS 162926, at *19 (W.D. Wash. Sep. 29, 2017);
19 *Multimedia Patent Tr. v. DirecTV, Inc.*, No. 09-CV-278-H (CAB), 2011 U.S. Dist. LEXIS
20 160302, at *10 (S.D. Cal. Mar. 4, 2011) (finding it improper and sanctionable when responses
21 were only "stating that the answers to the interrogatory can be derived from documents, but
22 failed to point to any particular documents or bates numbers").

1 **2. Ninebot's Responses Include Meritless Objections in an Effort to Avoid**
 2 **Discovery Obligations.**

3 **a. Ninebot's Boilerplate Proportionality Objections are Legally**
 4 **Impermissible.**

5 Ninebot's most common objection repeats a wholly unsupported rendition of Fed. R. Civ.
 6 P. 26(b)(1), claiming that nearly all of Solowheel's Requests are:

7 “not proportional to the needs of the case, considering the importance of the
 8 issues at stake in the action, the amount in controversy, the parties' relative access
 9 to relevant information, the parties' resources, the importance of the discovery in
 10 resolving the issues, and whether the burden or expense of the proposed discovery
 11 outweighs its likely benefits”

12 As this Court knows, “[t]he proportionality factor is not ‘intended to permit the
 13 opposing party to refuse discovery simply by making a boilerplate objection that it is not
 14 proportional. *Anderson v. Pac. Crane Maint. Co., L.P.*, No. 3:16-cv-05825-RJB, 2017 U.S.
 15 Dist. LEXIS 131645, at *1 (W.D. Wash. Aug. 17, 2017).

16 Ninebot also impermissibly does not provide any facts in support of its boilerplate
 17 objections. *Nat'l Union Fire Ins. Co. v. Coinstar, Inc.*, No. C13- 1014-JCC, 2014 U.S. Dist.
 18 LEXIS 94578, at *8 (W.D. Wash. July 10, 2014) (“The Court notes that it will generally not
 19 credit boilerplate or generic arguments, and expects parties to put forward sufficient facts, law,
 20 and analysis to allow the Court to determine whether an argument has merit.”); *Choquette v.*
 21 *Warner*, No. 3:15-CV-05838-BHS-JRC, 2017 U.S. Dist. LEXIS 95889, at *4 (W.D. Wash.
 22 June 21, 2017) ((“[I]t is well established that boilerplate objections do not suffice. Rather, a
 23 party resisting discovery must make some showing as to how each discovery request is not
 24 relevant and/or is overly broad or unduly burdensome.”) (internal quotations omitted)).

25 In addition to lacking factual support, Ninebot deploys this same objection regardless of
 26 context. For example, Request 27, asks for:

1 “[a]ll documents and things concerning Your projections for sales, revenue, and
2 profits associated with the Accused Products,”

3 Ninebot would have this Court believe that Request 27 is “not proportional to the needs
4 of the case” and that somehow Solowheel enjoys better “relative access” to Ninebot’s
5 financials. Sales, revenue, and profit data for accused products is commonly produced and
6 relevant to any damages analysis. This is simply one example of dozens where Ninebot’s
7 responses do not square with an honest attempt at participating in the discovery process.

8 In its responsive October 31, 2018 letter, Ninebot again attempts to skirt this issue, and
9 refuses to withdraw its unfounded objections. First, it ignores the case law provided by
10 Solowheel on the grounds that the FRCPs were updated. Solowheel acknowledges the update
11 and draws the Court’s attention to the cases cited *supra* which are (1) after the 2015 revision
12 and explicitly refer to the revision, and (2) directly support the prohibition against boilerplate
13 objections, which was not altered in any way by the 2015 revision. Ninebot’s objections
14 remain unsupported boilerplates and are therefore impermissible.

15 Ninebot’s only substantive response is that:

16 “sales of Ninebot One series of unicycle products in the US were not significant
17 in the context of the costs and fees with this lawsuit. A reasonable royalty on such
18 sales would be a small fraction of the gross revenue.”

19 This objection is improper for two reasons. First, it is improper to argue that you do not have
20 to properly respond to discovery because, in your unsupported opinion, you do not infringe at
21 scale. Second, and most ironically, Ninebot makes this type of objection while at the same
22 time refusing to produce sales and profit information to allow Solowheel to evaluate the claim.
23 Ninebot also ignores any possibility of willful infringement, or the fact that its infringement is
24 so blatant that this case is clearly exceptional.

1 **b. “Accused Products” is not Vague, Ambiguous or Misleading,
2 Ninebot’s Objection is an Attempt to Avoid its Obligations.**

3 In addition to consistently relying on factually unsupported boilerplate objections as
4 discussed above, in nearly every instance, Ninebot also objects because of a purported inability
5 to determine the bounds of the phrase, “accused products,” despite Solowheel providing a
6 specific definition:

7 “Accused Products” means any single wheel personal transport product or system,
8 or component thereof, developed, marketed, or sold by Ninebot, including at least
the Ninebot One.”

9 Hodges Decl. Ex. A at 5. Solowheel’s Request is narrowly tailored to cover only
10 products likely to infringe the ’250, ’698 and/or ’081 Patents. Ninebot knows exactly which of
11 its products are “single wheel personal transport products or systems.”

13 Solowheel also identified specific products, first in its definitions, then in its Amended
14 Complaint and Infringement Contentions (both served after Ninebot’s discovery responses).
15 Identifying any additional products, beyond those specifically called out in the various pleadings,
16 does not pose a burden on a company that knows its products and has a finite number of products
17 fitting the description of “Accused Products.” Further, this information is much easier for
18 Ninebot to access than for Solowheel, especially since, to this point, Ninebot has made sure
19 Solowheel does not have access to any Ninebot documents, including products lists.

21 Instead of simply responding to Solowheel’s requests, Ninebot opted to manufacture its
22 own confusion regarding the definition of “Accused Products.” Ninebot states “[t]he Plaintiffs
23 has only accused the ‘Ninebot One’ product depicted in the Complaint of infringement and, not
24 only is the definition misleading, by encompassing of ‘any single wheel personal transport
25 product or system, or component thereof, developed’ the request is rendered overly broad and

1 unduly burdensome.” Hodges Decl. Ex C at 3. Ninebot’s response ignores Solowheel’s provided
2 definition of “Accused Products”, and instead creates its own definition improperly importing
3 selected limitations from the first Complaint (again Ninebot refuses to supplement its responses
4 in light of the Amended Complaint and the Infringement Contentions), all in an attempt to stall
5 via objection. In addition, Ninebot’s objection only references language from the original
6 Complaint. This is moot in light of the Amended Complaint and Solowheel’s Preliminary
7 Infringement Contentions, which identify additional specific products and sub-models. At the
8 very least, Ninebot obligation to supplement pursuant to Fed. R. Civ. P. 26(e)(1) requires it
9 produce documents related to the specific products and models identified in the Amended
10 Complaint and Infringement Contentions, which it has not done.

12 Even ignoring the specific products identified by the Amended Complaint, Preliminary
13 Infringement Contentions and the definition, Solowheel is not limited to requesting discovery on
14 only those products mentioned in the Complaint or Infringement Contentions. Limiting
15 discovery to the products accused is contrary to “the broad and liberal” policy of discovery.
16 *Pacitti v. Macy's*, 193 F.3d 766, 777-78 (3d Cir. 1999). Indeed, the inherent purpose of discovery
17 would be stymied by limiting all discovery requests to the infringement known by the patent
18 holder before discovery. *Tessera Inc. v. Sony Elecs., Inc.*, No. 10- 0838-RMB-KMW, 2012 U.S.
19 Dist. LEXIS 180771, at *11 (D. Del. Aug. 6, 2012); *see also Epicrealm, Licensing, LLC v.*
20 *Autoflex Leasing, Inc.*, Nos. 2:05-CV-163-DF-CMC, 2:05-CV- 356-DF-CMC, 2007 U.S. Dist.
21 LEXIS 68784, 2007 WL 2580969, at *3 (E.D. Tex. Aug. 27, 2007) (refusing to limit discovery
22 only to products specifically named in infringement contentions).

1 Discovery aimed at single wheel personal transport devices, beyond those already
 2 identified in the Amended Complaint and Infringement Contentions, that may infringe the '250
 3 Patent is proportional to the needs of the case. The purpose of discovery is to even the playing
 4 field of knowledge, and Ninebot has more knowledge of its product lines than Solowheel.
 5

6 **V. Ninebot's Excuses and Responses are Unavailing.**

7 Since Solowheel began to push Ninebot regarding its failure to participate in discovery,
 8 Ninebot has been engaged in a constant game of blame-misdirection. For example, in Ninebot's
 9 responsive letter, dated October 31, 2018, Ninebot states:

10 “While we understand your concern that the production of document has been
 11 delayed, **we are surprised to first learn of your complaints to our written**
 12 **responses** to Solowheel's interrogatories and document requests which were
 13 served upon you on January 8, 2018 -- more than nine months ago. We have been
 14 working on the collection and processing of documents from Ninebot, and these
 15 efforts have progressed for several months based **upon the premise that**
 16 **Solowheel had acquiesced to our objections.**”

17 Hodges Decl. Ex. H at 1. Ninebot would have this Court believe that Ninebot's delay is actually
 18 Solowheel's fault, because Solowheel did not respond faster to Ninebot's objections. First,
 19 Solowheel's Motion is timely as discovery remains open and there is also no date by which
 20 Solowheel was required to respond to Ninebot's objections. Also, Solowheel waited to pursue
 21 this formally in the hopes that a reasonable settlement would be found and that an amicable
 22 resolution to these issues would be found. Second, Solowheel waited to respond to Ninebot's
 23 discovery responses and objections in hopes Ninebot would ultimately produce something, and
 24 that that information would be enough for Solowheel to proceed even if production was not full.

25 In addition, many of Ninebot's excuses are completely at odds with the discovery
 26 process; for example, Ninebot, in its October 31, 2018 letter, refuses to update its discovery

1 responses in light of the first Amended Complaint, instead arguing that Solowheel changed the
2 definitions when it did not, and contesting that its responses remain complete and correct, which
3 is clearly false. Hodges Decl. Ex. H at 2-3. Any argument that Ninebot's current production and
4 responses are complete and correct is simply inexcusable and serves to demonstrate why
5 Solowheel must now request this Court's assistance.
6

7 **VI. Request for Attorney's Fees.**

8 Under Fed. R. Civ. P. 37(a)(5), Plaintiff requests an award of attorney's fees incurred
9 with the present motion. Under the rule, “[i]f the motion is granted—or if the disclosure or
10 requested discovery is provided after the motion [is] filed—the court must, after giving an
11 opportunity to be heard, require the party . . . to pay the movant's reasonable expenses incurred
12 in making the motion, including attorneys' fees.” *Id.* Such fees may only be denied if (1) there
13 has been a failure to adhere to the conference requirements before making the motion, (2) the
14 opposing party's position “was substantially justified,” or (3) other circumstances make an award
15 of expenses unjust. *Id.* Here, Solowheel adhered to the conference requirement, Ninebot's failure
16 to produce for over a year cannot be substantially justified, and such an award would not be
17 unjust. If the Court awards attorney's fees, Plaintiff's counsel will submit declarations in support
18 as directed and instructed by the Court.
19

20 **VII. CONCLUSION**

21 Ninebot is currently infringing multiple Solowheel patents. Ninebot refuses to properly
22 participate in this lawsuit, while continuing to enjoy royalty free sales. Ninebot must participate
23 in discovery. Respectfully, Solowheel requests that this Court enter an Order requiring Ninebot
24 to fully respond to Solowheel's first discovery requests.
25

Dated: February 21, 2019

Respectfully submitted,

By: s/ Benjamin J. Hodges

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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